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The Status of International and Regional Conventions relating to Ship Source Marine Pollution in States in the Baltic Region

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January 2011



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List of Abbreviations

AFS	International Convention on the Control of Harmful Anti-fouling Systems on Ships, 2001
Basel	Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989
Bunkers	International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001
BWM	International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004
CDEM	Construction, Design, Equipment and Manning Standards
CLC	International Convention on Civil Liability for Oil Pollution Damage, 1992
CPSS	Common Policy on Safe Seas
Dumping	Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972; Protocol of 1996
ECJ	European Court of Justice
EMSA	European Maritime Safety Agency
EU	European Union
FUND	International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992; Supplementary Fund Protocol, 2003
GAIRAS	Generally Accepted International Rules and Standards
HELCOM	Helsinki Convention administered by Helsinki Commission
Helsinki Convention	The Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1992
HNS	International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996
IMO	International Maritime Organization
Intervention	International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969

LEG	Legal Committee
MARPOL 73/78	International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto
MEPC	Marine Environment Protection Committee
MSC	Maritime Safety Committee
OPRC-HNS Protocol	International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990; HNS Protocol, 2000
Salvage	International Convention on Salvage (), 1989
SRC	The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009
TFEU	Treaty on the Functioning of the European Union
UNCLOS	United Nations Convention on the Law of the Sea, 1982
UN	United Nations

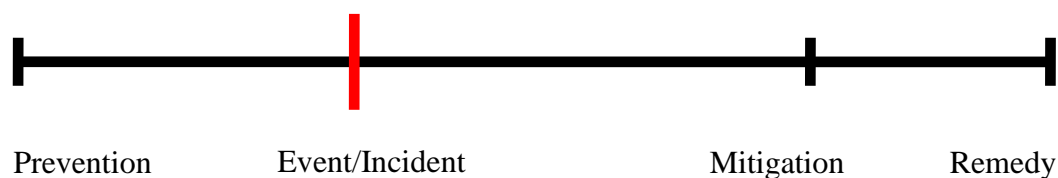
1. Introduction

The Baltic Sea region is made up of nine countries encompassing Estonia, Latvia, Lithuania (The Baltic States) Sweden, Denmark, Finland, Germany, Poland, and the Russian Federation. All countries except Russia are members of the European Union (EU).

This report presents a study of the current status of implementation of international and regional convention instruments related to ship source marine pollution applicable to the Baltic Sea region.

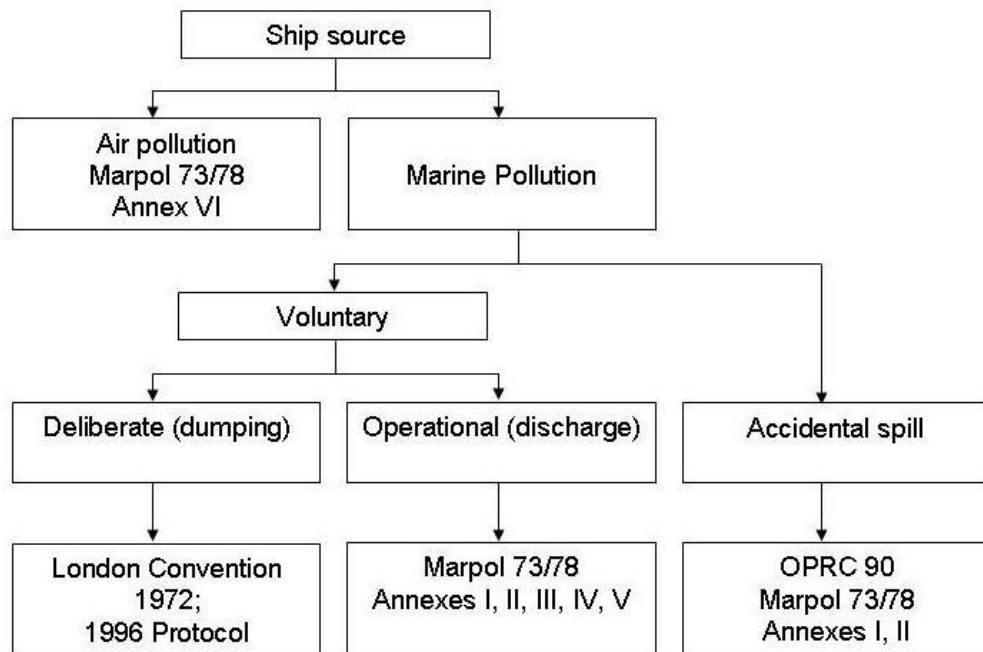
2. Ship source marine pollution

Protection of the marine environment can be conceptually depicted through a continuum as illustrated below.



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While marine pollution can be categorized as ship and non-ship source, in this report we are only concerned with ship source pollution impacting on the marine environment directly, or indirectly through the atmosphere. Furthermore, ship source marine pollution may be a voluntarily activity or it can be caused accidentally as in the case of oil spills. Where a ship source pollutant enters the sea from a voluntary act it may occur through the deliberate dumping of pollutants referred to as 'wastes' in relevant convention language, and also 'discharges' incidental to the normal operations of a ship. The categorization of marine pollution as described herein is illustrated in the flowchart appearing below.



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The international regime through which the deliberate dumping of wastes is regulated is the so called London Convention of 1972 modified by its Protocol of 1996. While this convention was adopted under the auspices of the Government of the United Kingdom which was originally the depository, this function is now executed by the International Maritime Organization (IMO). Almost all international convention instruments governing ship-source marine pollution are IMO Conventions. These are listed below together with the two non-IMO Conventions. While these conventions are all global in scope there is also the Helsinki Convention administered by Helsinki Commission (HELCOM) which is of particular importance to the Baltic Sea region.

3. List of international conventions related to ship-source marine pollution

3.1. IMO conventions

There are twelve IMO Conventions which deal with ship-source marine pollution. They are as follows:

- a) International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Intervention), 1969
- b) Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (Dumping), 1972; Protocol of 1996
- c) International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78)
- d) International Convention on Salvage (Salvage), 1989

- e) International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS), 1996; HNS Protocol 2010
- f) International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC), 1990; HNS Protocol (OPRC-HNS Protocol), 2000
- g) International Convention on Civil Liability for Oil Pollution Damage (CLC), 1992
- h) International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND), 1992; Supplementary Fund Protocol, 2003
- i) International Convention on the Control of Harmful Anti-fouling Systems on Ships (AFS), 2001
- j) International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers), 2001
- k) International Convention for the Control and Management of Ships' Ballast Water and Sediments (BWM), 2004
- l) The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships (SRC), 2009

The status of the above-noted convention instruments as of 28 February 2010 in the nine states is depicted in the table appearing in Annex 1 hereto.

3.2. Non-IMO conventions

There are two international conventions which contain provisions dealing with ship-source marine pollution. They are as follows:

- a) United Nations Convention on the Law of the Sea (UNCLOS), 1982
- b) Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel), 1989

All the above mentioned nine States and the EU have ratified both these Conventions.¹

¹ The EU is a Contracting Party to UNCLOS approved by Decision 98/392/EC OJ L 179, 23.6.1998, p. 1, and to the Basel Convention through Council Decision 93/98/EEC of 1.2.1993, published in OJ No L 39, p. 1.

4. Regional convention related to ship-source marine pollution

There is one regional convention which is applicable to the Baltic Sea dealing with ship-source marine pollution. The Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1992 (Helsinki Convention) covers the Baltic Sea and the entrances to the Baltic Sea bounded by the parallel of the Skaw in the Skagerrak at 57° 44.43'N, including the internal waters. This Convention has been ratified by all the nine States mentioned above and the EU.²

5. National legislation incorporating the above international and regional conventions

Combating ship-source pollution has been among the first environmental issues ever discussed at the international level and its global regime has now reached coverage and a level of specificity with few equivalents in other environmental areas. This articulated and comprehensive regime is based on two interdependent bodies consisting of an “umbrella” framework (i.e., customary law, UNCLOS and Chapter 17 of Agenda 21) and the regulatory regime which is contained almost exclusively in instruments adopted by the IMO. Due to its global nature, shipping is better regulated at the global level and regional maritime safety and anti-pollution standards have traditionally been an exception. In the past decade, however, new steps have been taken at the regional level (e.g., the Helsinki Convention) to raise the level of protection in regional seas, like the Baltic Sea, which are particularly exposed to the risk of pollution from international shipping.

It is a well established principle of international treaty law that in the so called dualistic system, express legislative enactment is invariably required for the implementation of a treaty in the national legislative domain. By contrast in the so called monistic system treaties can apply automatically as the law of the land upon ratification or accession so long as the treaty in question is self executing or directly applicable. If it is not, then express legislation is required in the same manner as in the case of dualism. The Russian Federation is a monistic state.

It is pertinent to note in the above context that the process of effectuation of EU legislation in its member states is distinctively different. The EU legislative framework consists of three strands of legislation, namely, the Regulation, the Directive and the Decision which operates in consonance with the institutional framework of the EU comprising the Council of Ministers otherwise referred to as the Council, the Commission and the Parliament. The Council as the principal law making institution is vested with the competence to generate legislation. Regulations can emanate from the Council or the Commission and have the force of law in all member states upon being promulgated. The Directive which sets out a general policy goal allows member states to implement the Directive in its own national order through national legislation. The Decision is in the nature of an administrative rather than a legislative measure and it is not of general application in member states.

² The EU is a Contracting Party to the Helsinki Convention through Council Decisions 94/156/EC and 94/157/EC.

Regulations and Directives are acts of general application and are primary in character whereas the Decision is binding but not a measure of general application.

In terms of the Baltic Sea region, eight of the nine states are members of the EU and therefore the regulation of shipping in these eight states is governed primarily by EU legislation. It is therefore instructive at this point to take a closer look at the EU's cooperation on ship-source marine pollution at the international level.

The EU in implementing its international obligations under UNCLOS is subject to three main sets of obligations:

- a) to adopt the necessary measures to “minimize to the fullest possible extent” pollution from ships;
- b) to cooperate in the multilateral development of international standards in IMO to “prevent, reduce and control” ship-source pollution; to promote the adoption of routing systems to minimize the risk of accidents; and to re-examine these standards from time to time; and
- c) to give effect to existing Generally Accepted International Rules and Standards (GAIRAS) and enforce them in the EU.

UNCLOS created a global regime based on a maximum level of uniformity and flexibility and where the conflicting interests involved are carefully balanced. The jurisdictional framework of that regime is laid down in UNCLOS which distributes the power to adopt and enforce ship-source pollution standards between flag, coastal and port States. Part XII addresses the prevention of ship-source marine pollution and the relevant provisions are among the most detailed in the entire Convention. The consistent practice of states, including nonparties to UNCLOS, indicates that these provisions are generally considered as reflecting customary international law.³

UNCLOS recognizes that shipping activities place strong pressure on the marine environment and require all States to take the necessary measures to “minimize to the fullest possible extent” pollution from vessels.⁴ These measures, however, have to be taken while avoiding “unjustifiable interference” with the exercise of the rights of other States according to the Convention.⁵

In order to ensure the maximum level of uniformity UNCLOS places considerable restraints on the capacity of coastal States to act unilaterally and sets out the framework for the multilateral development of the relevant rules within “the” competent international organization: namely the IMO. The IMO is considered to be the only body with competence to generate regulatory law relating to ships at the international level. It is proper forum in which coastal State demands for more stringent protection are balanced with flag State needs to preserve the freedom of

³ The customary international law nature of UNCLOS provisions in the field of ship-source pollution has been expressly recognized by the ECJ in the *Poulsen* Case (Para. 9).

⁴ UNCLOS Article 194(3)(b) requiring States to adopt measures for preventing accidents and dealing with emergencies; ensuring the safety of operations at sea; preventing intentional and unintentional discharges; and regulating the design, construction, equipment, operation and manning of vessels. In addition, UNCLOS contains a number of cooperation requirements to prevent or minimize accidental pollution and to respond effectively to emergency situations (e.g., Articles 198, 199 and 211(7)).

⁵ *Ibid*, Article 194(4).

navigation.⁶ Article 211(1), therefore, requires all States to cooperate within the IMO or general diplomatic conferences⁷ in the multilateral development of standards to “prevent, reduce and control” ship-source pollution and to promote the adoption of routing systems to minimize the risk of accidents. States are required to re-examine these standards from time to time as necessary in order to keep the overall system constantly up to date.

UNCLOS does not contain technical requirements, but by means of “rules of reference” requires flag States to give effect to existing GAIAS. The main GAIAS relating to ship-source pollution are contained in the global regulatory instruments adopted by the IMO.⁸ The “rule of reference” contained in UNCLOS does not only ensure uniformity, but also great flexibility, since, IMO standards contained in conventions may be rapidly updated by means of a tacit acceptance amendment procedure.⁹

The maritime safety and anti-pollution GAIAS referred to in UNCLOS are mainly contained in IMO regulatory instruments of a various legal nature.¹⁰ As the LEG has pointed out, in order to establish whether parties to UNCLOS are obliged to implement IMO instruments it is decisive to look at their degree of international acceptance.¹¹ Relevant GAIAS, therefore, do not only include binding conventions (e.g., MARPOL), but also a large number of IMO recommendations, codes and guidelines which are adopted by the IMO by consensus.¹²

5.1. EU cooperation on ship-source marine pollution at international and regional level

International cooperation is one of the primary components of the EU’s Common Policy on Safe Seas (CPSS) and for a long time has been considered the most effective tool to enhance maritime safety and reduce the environmental impact of international shipping in EU waters.¹³ However, the EU’s external competence in the field of maritime transport is not expressly laid down in the Treaty on the Functioning of the European Union (TFEU) or the erstwhile EC Treaty, but finds its legal basis in

⁶ S. Rosenne and A. Yankov (eds) (1991), pp. 176-207. On the IMO as “the” competent international organization see, *inter alia*, “Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization”, IMO doc. LEG/MISC/3/Rev.1, 6.1.2003. For a general discussion see: A. Blanco Bazán (2003), pp. 31-47.

⁷ The general diplomatic conferences (GDC) was introduced to meet the concerns of some developing states which saw the IMO as an organization of maritime States.

⁸ In addition, some GAIAS related to ship-source pollution have been adopted by ILO and IAEA.

⁹ See “Focus on IMO: A summary of IMO Conventions 2009” available online at www.imo.org/includes/blastData.asp/doc_id.../SUMMARY%202009.pdf

¹⁰ The IMO regulatory instruments may be divided into two categories: those containing ship safety and anti-pollution standards and those covering pollution response, compensation and liability. The latter are not discussed in this report.

¹¹ “Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization”, IMO doc. LEG/MISC/3/Rev.1, 6.1.2003, p. 6.

¹² Since all 164 IMO Members may participate in the negotiation of IMO resolutions, these represent GAIAS and LOSC Parties are expected to comply with them. See: IMO doc. LEG/MISC/3/Rev.1, *ibid*, p. 5. See also P.W. Birnie in H. Ringbom (ed.) (1997), pp. 31-57.

¹³ The CPSS (Para. 61) calls for an enhanced role of the EC in the IMO and other relevant organizations dealing with vessel-source pollution. See also CPSS, Paras 146-151 and the Commission’s Communication, “Community Participation in International Organs and Conferences”, SEC (93) 36, 1.03.1993, p. 18.

the ECJ's doctrine of the "implicit" external powers. In the leading *ERTA Case*¹⁴ the ECJ made it clear that the Community's¹⁵ external competences are coextensive with those which are internal (the so-called principle of "*in foro interno, in foro externo*").¹⁶ According to the Court, the Community is entitled to conclude international conventions or to establish contractual links with third countries not only by virtue of an express conferment by the Treaty, but such competence can be "implied by other provisions of the Treaty conferring internal powers."¹⁷ When the EU has used its powers to adopt internal legislation, it acquires competence to act externally concerning the same subject-matter. Ship-source pollution is an area where the EU has acquired implicit external competence on the basis of internal legislation.

In the *Kramer Case* and in *Opinion 1/76* the ECJ took a further step and recognized that the Community's external powers may derive from the provisions of the Treaty conferring internal competence even in the absence of internal legislation whenever the external action appears "necessary for the obtainment of one of the Community objectives" (the so-called *Kramer/Opinion 1/76 Doctrine*).¹⁸ Considering the central position acquired by the environmental objective within the EC legal framework, the *ERTA* and the *Kramer/Opinion 1/76 Doctrine* confer on the EU potentially unlimited external competence in environmental matters.¹⁹

The external competence of the EU stems directly from the exercise of internal powers and is "necessary" to achieve the objectives of EU maritime safety legislation. For a long time, however, member states used the lack of a specific legal basis in the Treaty and the subsidiarity principle to keep the Community away from the international scene and to preserve their individual participation in the IMO. In the past twenty years, however, the continuous expansion of the scope of EU legislation has progressively eroded the capacity of member states to act alone.

5.1.1 Division of external competence in ship-source marine pollution

The EU and its member states share competence in the field of maritime transport and maritime safety. This is reconfirmed in the Declaration of competence deposited by the Community pursuant to Article 5(1) of Annex IX of UNCLOS at the time of accession to that Convention. The Declaration makes it clear that in the field of maritime transport, the safety of navigation and the prevention of marine pollution as

¹⁴ C-22/70 *Commission v Council (ERTA case)* [1971] ECR 263.

¹⁵ It is to be noted that following recent institutional changes in the EU after the entry into force of the Lisbon Treaty on 1 December 2009, the title of the 'Treaty establishing the European Community' is replaced by 'Treaty on the Functioning of the European Union'. In this report, the EU is interchangeably referred to as the "Community" or "EC", as appropriate contextually.

¹⁶ Case C-22/70 (*ERTA*), Para. 19. See in detail: J. Temple Lang (1986), p. 197.

¹⁷ Case C-22/70 (*ERTA*), Para. 16. On the Community's implicit external competence see, *inter alia*, J. Jans, (2000), p. 80; A. Dashwood in M. Koskeniemi (ed.) (1998), pp. 113-123; I. Macleod et al. (1996), pp. 46-53; R. Frid (1995), p. 74; A. Maunu (1995), pp. 115-27; A.T.S. Leenen (1992), p. 101; and A. Nollkaemper, (1987), pp.63-6.

¹⁸ Joined Cases 3, 4, 6/76 (*Kramer*) and *Opinion 1/76*, (Para. 17).

¹⁹ So far, however, the EU has made limited use of its implied external competence and has only taken action on the basis of the *Kramer -Opinion 1/76 Doctrine* in two cases: i.e., the signature of the 1974 Paris Convention on land-based pollution and the commitment made within the UN Framework Convention on Climate Change. In both cases there were no internal rules justifying the EC's external action. However, the Commission has relied on the *Kramer -Opinion 1/76 Doctrine* on other occasions, such as the proposed accession to the 1972 Oslo Convention.

regulated in Parts II, III, V, VII and XII of UNCLOS, competence of the EU is shared with its member states. This Declaration, recalling the *ERTA* Doctrine, recognizes the evolving nature of EU competence which, as a consequence of pre-emption, may become exclusive. The Declaration lists the existing EU maritime safety legislation covering matters governed by UNCLOS and makes it clear that the nature of EU competence stemming from existing and future EU legislation must be assessed on a case-by-case basis looking at the scope and the content of each measure.

Most of EU maritime safety legislation is in the form of directives. Article 84(2) of the EC Treaty of Rome 1957 as amended by Article 16(5) of the Single European Act of 1986 formed the fundamental basis for regulation of shipping in the EU. Following recent institutional changes in the EU, starting from 1 December 2009, the wording of Article 80(2) which was previously 84(2) of the EC Treaty and is now Article 100 of the TFEU has been changed. Previously it was –

The Council may, **acting by a qualified majority**, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport. The procedural provisions of Article 71 shall apply.

Now the wording is –

The European Parliament and the Council, acting **in accordance with their ordinary legislative procedure**, may lay down appropriate provisions for sea and air transport. They shall act after consulting the Economic and Social Committee and the Committee of the Regions.

However, these changes largely concern procedural rules and not matters of substance.

The EU directives on shipping seek a higher degree of harmonization compared to environmental directives adopted under Article 192 of the TFEU. This is, in particular, the case for all directives under Article 100 of the TFEU, directed at ensuring the uniform and consistent application of IMO standards within the EU.²⁰ Uniformity and the complete harmonization of rules among the member states is indeed one of the main objectives of the CPSS. Most of the Article 100 directives do not only have an environmental or safety objective, but also aim at eliminating all differences which may work as a barrier to trade (e.g. Construction, Design, Equipment and Manning Standards (CDEMs)) between the member states thereby protecting competition. Article 100(2), unlike Article 193 does not allow member states to maintain or introduce more stringent protective measures. Unless it is explicitly provided in the Directive, therefore, member states are not entitled to adopt higher standards, which would jeopardize the full achievement of the objective of EU legislation. Maritime safety directives, except the Ship-Source Pollution Directive, do not contain such a possibility and normally lay down maximum standards. In other words, they “totally harmonize” the matter thereby triggering pre-emption. The same holds true for maritime safety regulations (e.g., the phasing out of single-hulled tankers), which contain maximum standards.²¹

²⁰ See, *inter alia*, SEC (2002) 381 on the EC’s accession to the IMO, 9 April 2002, Para. 2.

²¹ E.g., Council Regulation 1726/2003, on transport of oil in single-hulled tankers; Commission Regulation 2158/93 on the application of amendments to SOLAS and MARPOL 73/78; and Council

On the basis of its maritime safety legislation the EU has acquired exclusive competence in a large number of matters regulated by IMO instruments²² and conventions generated by other relevant bodies. Thus, member states have lost their capacity to negotiate and take individual decisions in these matters. The lack of legal status in the IMO and the existence of observer status at the UN, however, makes it impossible for the EU to exercise its competence in these forums, requiring it to act through the coordinated actions of its member states. Member states maintain their exclusive competence with regard to the exercise of jurisdiction over their vessels, the flagging and registration of ships and the enforcement of administrative or penal sanctions, but they have to act consistently with EU law. Likewise, in the absence of EU legislation or outside its scope, member states are substantially free to participate in the development of international maritime safety rules as long as they do not interfere with intra-EU trade.²³ Following the broad interpretation given by the ECJ, some maritime safety standards (e.g. CDEMs) might be considered as “measures having an equivalent effect” to trade restrictions and to fall within the scope of that prohibition. Nonetheless, on the basis of Article 4 of TFEU they must closely cooperate with EU institutions in order to defend the EU’s interests. Article 4 of TFEU requires member states, as a minimum, to consult the Commission on shipping-related issues which may affect EU interests and to make an effort to coordinate their positions before discussing these matters at the international level. In the past there have been several attempts to formalize cooperation in the field of maritime transport, but they have not been very successful.²⁴ In the absence of a “code of conduct”, however, the forms of coordination vary depending on the forum and the issues on the agenda.

5.1.2. EU participation and coordination in IMO

The EU is not a party to the IMO Convention, which reserves membership exclusively to States; neither does it have observer status in the Organization.²⁵ The Commission participates at IMO meetings on the basis of an Agreement of Mutual Co-operation concluded between the Commission and the IMO Secretary-General in 1974.²⁶ Before the *Erika* accident, when there was not much EU maritime safety

Regulation 2978/94 on the implementation of IMO Resolution A.747 (18) on the application of tonnage measurements of ballast spaces in segregated ballast oil tankers.

²² For e.g., in the area of MARPOL Annex I, Regulations 20 and 21; and SOLAS, Chapter V/20.

²³ See Article 34 of TFEU.

²⁴ See Council Decision 77/587/EEC setting up a consultation procedure on relations between member states and third countries in shipping matters and on action relating to such matters in international organizations. The aim of these consultations, however, were to determine whether shipping-related issues dealt with by an international organization raised problems of common interest, but it was up to the member states to decide whether or not they should coordinate their actions (Article 2). In 1996, the Commission tried to reinforce the consultation procedure and proposed a prior Commission authorization for the negotiation by member states of agreements with third countries in the field of maritime transport (COM(1996) 707, OJ C 113, 11.04.1997), but, in 2001, it withdrew the proposal (COM (2001) 763).

²⁵ 1948 IMO Convention, Article 4.

²⁶ The Agreement (28/06/1974) contains provisions on technical cooperation and the exchange of information. It has never been changed and it still forms the basis for cooperation between the EU and the IMO and for participation of the Commission, as an observer, at all IMO meetings. See: SEC (2002) 381 on the EC’s accession to IMO, 9.04.2002, Annex III. See also: Exchange of letters between the Commission and the IMO Secretariat on consultation, exchange of information, Commission

legislation in place or strong interests to be defended in the IMO, EU coordination was very informal. With the evolution of EU maritime safety legislation, EU interests in the IMO have increased and EU coordination mechanisms have been reinforced and formalized to a large extent.

Recently, a clear distinction has been introduced between issues of “Community competence” where there is EU legislation which leads to exclusive EU competence (e.g., in the field of Regulations 20 and 21 of Annex I, MARPOL) and issues of “Community interest” where competence is still shared with member states. On issues of EU interests member states have to try to achieve a “coordinated position” within the informal meetings chaired by the Commission in Brussels. On issues of EU competence they have to reach “common positions” within meetings chaired by the Council.

5.1.3. EU accession to IMO conventions

In the wake of the *Prestige* incident in 2002, the IMO Secretary-General recommended that, for the time being, the EU should pursue its objectives vigorously and supportively through the Organization, rather than through regional measures. The capacity of the EU to promote its targets in the IMO, however, is limited by its lack of membership in the Organization. In the view of the Commission, this status does not reflect the central role currently being played by the EU in the international maritime scene and its increased competence in matters regulated by the IMO. Full IMO membership is necessary for the EU in order to exercise its external competence and defend its interests at the international level. In April 2002, therefore, the Commission requested a mandate from the Council to negotiate the EU’s accession to the IMO Treaty.²⁷ The objective is to allow the EU to become a full member on an equal footing with other IMO State Parties with the right to speak and vote on behalf of (and not in addition to) the member states within the principal Committees (i.e., MSC, MEPC and LEG) and to assume those rights and duties stemming from IMO instruments in all matters under its exclusive competence.²⁸ Meanwhile, the Commission proposed the adoption of transitional measures to improve EU coordination and ensure stronger EU representation at IMO.²⁹

EU accession would require an amendment to the IMO Convention of 1948 allowing regional economic integration organizations to become members. Since amendments enter into force twelve months after acceptance by two-thirds of the IMO members present in the Assembly, accession may be a difficult for the EU and a rather long-term process. In addition, non-EU IMO member states do not seem to have strong incentives to support the amendment of the IMO Convention in order to allow EU to become a member. Instead of finding a way for the EU to become a member of the

participation as an observer (11.02.1974 and 28.06.1974) and on arrangements for the effective implementation of IMO conventions (5.01.1983 and 2.02.1983), all collected in: “Relations between the Community and International Organizations (“Relations”), EEC Commission (1989), pp. 163-166.

²⁷ SEC (2002) 381, 9.04.2002.

²⁸ The EC should have a number of votes equivalent to the number of member states represented in the given IMO body and bound by the EU instruments from which external competence arises, SEC (2002) 381, Para. 6(b). Member states would maintain their individual right to speak and vote on those matters on which there is no EU legislation and which remain subject to their exclusive competence (*ibid.* Para. 3.2.2).

²⁹ SEC (2002) 381, Para. 4.

IMO, it seems far more realistic, for the time being, to strengthen mechanisms to ensure that all member states speak with “a single voice” and find more pragmatic solutions to allow the EU to exercise its competence and express its view in the IMO without being a full member of the organization (e.g., by seeking observer status).

5.1.4. EU participation in HELCOM

In the early years of HELCOM, the European Commission did not show much interest in HELCOM’s activities. However, since 2003 in the wake of the *Prestige* disaster and the 2004 enlargement of the EU, the Commission has shown more interest in HELCOM’s activities although it has not played much of a proactive role. So far, the Commission’s contribution to the work of HELCOM has mainly focused on ensuring that any steps taken to improve the situation in the Baltic Sea are in line with EU maritime safety legislation.³⁰ The Commission’s approach in HELCOM has been influenced by a number of factors. First of all, there is a general tendency to leave the implementation of the Helsinki Convention to the member states, which have a long tradition of individual participation in this forum. Before the *Erika* legislation, moreover, there were no major overlaps between EU and HELCOM rules and the EU had not acquired any (implicit) exclusive competence in maritime safety-related matters covered by HELCOM.³¹ The Commission, therefore, had no strong interests to defend in this forum.

With the development of EU maritime safety legislation, the EU extended the area of competence that might be affected by measures adopted in HELCOM and it partially changed its approach. In general, however, the Commission does not seem to have strong interests in strengthening the work of HELCOM MARITIME. The Helsinki Convention has indeed been adopted to preserve the marine environment in the Baltic and to deal with marine environmental problems, but not with shipping issues. The prevalent feeling seems to be that maritime safety issues would be better regulated through the IMO, not HELCOM, and their implementation and enforcement would be better harmonized at the EU level. The adoption of more stringent protective measures in HELCOM may hinder EU-wide harmonization.

In HELCOM MARITIME, like in HELCOM, there is no EU coordination as in IMO, but simply mutual communication of information. After the enlargement of the EU in 2004, HELCOM now serves as a bridge between the EU and the Russian Federation and as an important forum for the EU to promote the uniform application of maritime safety and anti-pollution standards throughout the Baltic Sea. The EU is therefore determined to keep HELCOM as a forum for cooperation, not confrontation, with the Russian Federation and for promoting the wider application of EU maritime safety rules.³²

³⁰ See Reports of the HELCOM MARITIME meetings.

³¹ The only overlapping rules concerned minimum requirements for ships bound to or leaving Baltic State ports and carrying dangerous or polluting goods. In 1998, when HELCOM Rec. 19/15 was adopted, the EC already had legislation in place on the same issue (i.e., Directive 79/116/EEC). However, the HELCOM Rec. mirrors the EC legislation. At the time when HELCOM started adopting measures related to double-hull standards (1991), routing measures (1994), PRF (1998), or a harmonized system of fines in the case of MARPOL violations (1998) there was no EC legislation in place on these issues.

³² In the past few years the Commission has intensified dialogue with the Russian Federation to promote the wider implementation of EC’s maritime safety standards. E.g. Joint Statement, 12th EU-

The EU coordination in HELCOM does not seem to be necessary either. Final decisions in HELCOM are taken by unanimity and the Commission, just as any other Party, has a veto on matters under its exclusive competence. Reportedly, there have never been significant conflicts of competence between the Commission and the EU Baltic States with regard to maritime safety matters discussed in HELCOM. In addition, most of the work of HELCOM in this field has been influenced by³³ and is linked to EU maritime safety legislation.³⁴

After 1 May 2004, all Baltic contracting parties, except the Russian Federation, are now bound by EU rules, which in some cases (e.g., double-hull standards) contain maximum standards. Especially after the enlargement, therefore, ensuring consistency and coordination between the two regimes has become of utmost importance for HELCOM.³⁵ During 2005, HELCOM further strengthened its cooperation with the European Maritime Safety Agency (EMSA). The Commission and HELCOM are determined to avoid any duplication of work and to optimize their efforts and resources.³⁶ For the time being, HELCOM MARITIME has decided to concentrate exclusively on activities which bring added value, keeping in mind the specific needs of the Baltic, acting in strict coordination with the EU. This is particularly the case when there is a need to involve the Russian Federation.

5.1.5. EU Directive on ship-source pollution and the introduction of penalties for infringements

In the aftermath of the *Prestige* incident, the EU presented a proposal that aimed to elevate illegal discharges, including accidental discharges, to criminal offences.³⁷ A Directive was adopted in September 2005, over two years after the original proposal.³⁸ The Directive intends to fill three major gaps: the absence of specific EU

Russia Summit, Rome, 6 November 2003, at (10), available at: europa.eu.int/comm/energy_transport/russia/2003_11_06_joint_statement_en.pdf.

³³ Initially, the influence of EU law in HELCOM was marginal, since only two out of the nine contracting parties of the 1974 Helsinki Convention were also EU member states (Germany and Denmark) and the EU's maritime safety policy had not yet been established. After Finland and Sweden joined the EU in 1995, the influence of EU law on HELCOM started to increase. But it was only after the *Erika* accident that EU maritime safety legislation acquired great importance in HELCOM.

³⁴ E.g., The 2003 Bremen Ministerial Declaration called for a new focus for HELCOM's work in view of the enlargement. See also the interview with Prof. Dr. Inese Vaidere, Chair of HELCOM, 30.04.2004, available at: www.helcom.fi/helcom/news/382.html. See also the Preamble to the Copenhagen Declaration; and the Joint IMO/EU/HELCOM Workshop, held in March 2003. HELCOM Rec. 22E/5 urging Parties to carry out PSC under either the Paris MOU or the EC Directive.

³⁵ E.g., HELCOM Rec. 22E/5 urging Parties to carry out PSC under either the Paris MOU or the EC Directive.

³⁶ In 2003, during the drafting of the EC regulation on single-hull tankers, the Commission announced its intention to submit a new proposal to strengthen safety requirements for ships navigating in ice covered waters in the Baltic Sea and considered the opportunity of an EC driven submission in IMO for the adoption of analogous measures. This idea was however abandoned in light of recent developments in HELCOM (i.e., HELCOM Rec. 25/7, 2.03.2004, setting new Guidelines for the Safety of Winter Navigation in the Baltic Sea Area).

³⁷ COM (2003) 92, 5.03.2003. The proposed Directive has been supplemented by COM (2003) 227, 2.05.2003, for a Council Framework Decision, based on Article 29 EU (third pillar), which strengthens the criminal law framework for the enforcement of anti-pollution legislation.

³⁸ Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements, adopted on 7.09.2005. In June 2004, Transport Council, upon first reading, reached a political

discharge standards; the ineffective and inconsistent implementation of MARPOL 73/78 in EU waters; and the absence of effective enforcement mechanisms under international law to ensure compliance. Its main purpose is to incorporate the MARPOL 73/78 discharge standards into EU law and to harmonize their enforcement by ensuring that those who are responsible for marine pollution, both natural and legal persons (e.g., the shipowner, master, the owner of the cargo, classification societies) are subject to adequate penalties.³⁹ The Directive contains minimum rules and allows member states to take more stringent measures against ship-source pollution in conformity with international law (Article 1(2)).

5.2. Status of conventions relating to ship source marine pollution

The investigation shows that with regard to the effectuation of different IMO conventions there is considerable EU legislation. These are listed in Annex 2 hereto. In some of these eight states, there is further national legislation in which there are cross-references to the IMO convention provisions. These are promulgated and published in the respective national languages and are additional to the applicable EU legislation concerning this subject matter. They are listed in Annex 3 hereto.

6. Conclusion

In this report an up-to-date list of EU legislation addressing all convention instruments listed in sections 3 and 4 above are presented together with selective information on national legislation relating to these instruments. The states in the Baltic region have ratified and implemented almost all the international conventions dealing with prevention, liability and compensation of ship source oil pollution. The Bunkers Convention has been ratified by all the states in this region except Sweden. However, no state in this region has ratified the HNS Convention except Lithuania and Russia. As at April 2010, 14 states have ratified the HNS Convention but the other requirements to enable entry into force of the convention have not been met. A Protocol to the HNS Convention was adopted by consensus on 30 April 2010 at a Diplomatic Conference convened by IMO to facilitate ratification and rapid entry into force of the HNS Convention. The Diplomatic Conference also adopted four resolutions on the establishment of the HNS Fund which is already provided for in the Convention; promotion of technical co-operation and assistance; avoidance of a situation in which two conflicting treaty regimes are operational; and implementation of the Protocol.

The gap in international liability regimes with respect to liability and compensation for the carriage of hazardous and noxious substances will be filled with the entry into force of the HNS Protocol. It is submitted that the ratification and implementation of this Convention by states in the Baltic region will be a welcome addition to the existing liability and compensatory regimes with respect to ship source marine pollution.

agreement on its common position on the Commission's proposal (10503/04), with Greece and Malta voting against. For a full discussion see: V. Frank (2005), pp. 44-9.

³⁹ Ship Source Pollution Directive, Article 1. The Directive covers discharges of oil under MARPOL Annex I and noxious substances under MARPOL Annex II (Article 2 (2)).

Annex 1

Status of IMO conventions relating to ship-source marine pollution in the states of the Baltic region

In the following table x means accession, ratification, etc. and d means denunciation

	MARPOL 73/78 (Annex I/II)	MARPOL 73/78 (Annex III)	MARPOL 73/78 (Annex IV)	MARPOL 73/78 (Annex V)	MARPOL Protocol 97 (Annex VI)	London Convention 72	London Convention Protocol 96 INTERVENTION Convention 69	INTERVENTION Protocol 73	CLC Convention 69	CLC Protocol 76	CLC Protocol 92	FUND Convention 71	FUND Protocol 76	FUND Protocol 92	FUND Protocol 2003	SALVAGE Convention 89	OPRC Convention 90	HNS Convention 96	OPRC/HNS 2000	BUNKERS CONVENTION 01	AFS 2001	BALLASTWATER 2004	HONG KONG SRC 2009	HNS PROTOCOL 2010
Denmark	x	x	x	x	x	x	x	x	d	x	x	d	x	x	x	x	x		x	x	x			
Estonia	x	x	x	x	x		x	x	d		x	x		x	x	x	x		x	x	x			
Finland	x	x	x	x	x	x	x	x	d	x	x	d	x	x	x	x	x			x				
Germany	x	x	x	x	x	x	x	x	d	x	x	d	x	x	x	x	x		x	x	x			
Latvia	x	x	x	x	x		x	x	x		x			x	x	x	x			x	x			
Lithuania	x	x	x	x	x						x			x	x	x	x	x		x	x			
Poland	x	x	x	x	x	x	x	x	d	x	x	d	x	x	x	x	x		x	x	x			
Russian Federation	x	x	x	x		x	x	x	d	x	x	d	x	x		x	x	x		x				
Sweden	x	x	x	x	x	x	x	x	d	x	x	d	x	x	x	x	x		x		x	x		

Annex 2

List of EU legislation relating to the IMO conventions dealing with ship-source marine pollution

1. Commission Regulation (EU) No. 428/2010 implementing Article 14 of Directive 2009/16/EC of the European Parliament and of the Council as regards expanded inspections of ships.
2. Directive 2009/123/EC of the European Parliament and of the Council amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements.
3. Directive 2009/17/EC of the European Parliament and of the Council amending Directive 2002/59/EC establishing a Community vessel traffic monitoring and information system.
4. Directive 2009/16/EC of the European Parliament and of the Council on port State control.
5. Regulation (EC) No. 391/2009 of the European Parliament and of the Council on common rules and standards for ship inspection and survey organizations.
6. Commission Directive 2009/26/EC amending Council Directive 96/98/EC on marine equipment.
7. Commission Decision 2009/491/EC on criteria to be followed in order to decide when the performance of an organization acting on behalf of a flag State can be considered an unacceptable threat to safety and the environment.
8. Directive 2009/18/EC of the European Parliament and of the Council establishing the fundamental principles governing the investigation of accidents in the maritime transport sector and amending Council Directive 1999/35/EC and Directive 2002/59/EC of the European Parliament and of the Council.
9. Directive 2009/21/EC of the European Parliament and of the Council on compliance with flag State requirements.
10. Commission Regulation (EC) No. 536/2008 giving effect to Article 6(3) and Article 7 of Regulation (EC) No. 782/2003 of the European Parliament and of the Council on the prohibition of organotin compounds on ships and amending that Regulation.
11. Commission Directive 2008/67/EC amending Council Directive 96/98/EC on marine equipment.
12. Directive 2008/98/EC of the European Parliament and of the Council on waste and repealing certain Directives.

13. Commission Regulation (EC) No 93/2007 amending Regulation (EC) No. 2099/2002 of the European Parliament and of the Council establishing a Committee on Safe Seas and the Prevention of Pollution from Ships (COSS).
14. Commission Directive 2007/71/EC amending Annex II of Directive 2000/59/EC of the European Parliament and of the Council on port reception facilities for ship-generated waste and cargo residues.
15. Regulation (EC) No. 1891/2006 of the European Parliament and of the Council on multiannual funding for the action of the European Maritime Safety Agency in the field of response to pollution caused by ships and amending Regulation (EC) No. 1406/2002.
16. Regulation (EC) No. 336/2006 of the European Parliament and of the Council on the implementation of the International Safety Management Code within the Community and repealing Council Regulation (EC) No. 3051/95.
17. Directive 2006/66/EC of the European Parliament and of the Council on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/157/EEC.
18. Regulation (EC) No. 1013/2006 of the European Parliament and of the Council on shipments of waste.
19. Directive of the European Parliament and of the Council 2006/87/EC laying down technical requirements for inland waterway vessels and repealing Council Directive 82/714/EEC.
20. Directive 2005/35/EC of the European Parliament and of the Council on ship-source pollution and on the introduction of penalties for infringements.
21. Council Framework Decision 2005/667/JHA to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution.
22. Directive 2005/33/EC of the European Parliament and of the Council amending Directive 1999/32/EC relating to a reduction in the sulphur content of certain liquid fuels.
23. Commission Decision 2004/156 establishing guidelines for the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC of the European Parliament and of the Council.
24. Regulation (EC) No. 724/2004 of the European Parliament and of the Council amending Regulation (EC) No. 1406/2002 establishing a European Maritime Safety Agency.
25. Regulation (EC) No. 782/2003 of the European Parliament and of the Council on the prohibition of organotin compounds on ships.

26. Regulation (EC) No. 1406/2002 of the European Parliament and of the Council establishing a European Maritime Safety Agency.
27. Regulation (EC) No. 2099/2002 of the European Parliament and of the Council establishing a Committee on Safe Seas and the Prevention of Pollution from Ships (COSS) and amending the Regulations on maritime safety and the prevention of pollution from ships.
28. Directive 2002/84/EC of the European Parliament and of the Council amending the Directives on maritime safety and the prevention of pollution from ships.
29. Directive 2002/59/EC of the European Parliament and of the Council establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC.
30. Directive 2001/106/EC of the European Parliament and of the Council amending Council Directive 95/21/EC concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (port State control).
31. Directive 2001/105/EC of the European Parliament and of the Council amending Council Directive 94/57/EC on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations.
32. Directive 2001/81/EC of the European Parliament and of the Council on national emission ceilings for certain atmospheric pollutants.
33. Directive 2000/59/EC of the European Parliament and of the Council on port reception facilities for ship-generated waste and cargo residues
34. Directive of the European Parliament and of the Council 2000/76/EC on the incineration of waste
35. Decision No. 2850/2000/EC of the European Parliament and of the Council setting up a Community framework for cooperation in the field of accidental or deliberate marine pollution
36. Council Directive 1999/32/EC relating to a reduction in the sulphur content of certain liquid fuels and amending Directive 93/12/EEC.
37. Commission Regulation (EC) No. 1547/1999 determining the control procedures under Council Regulation (EEC) No 259/93 to apply to shipments of certain types of waste to certain countries to which OECD Decision C(92)39 final does not apply.
38. Council Directive 96/98/EC on marine equipment.

39. Council Directive 95/21/EC concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (port State control).
40. European Parliament and Council Directive 94/63/EC on the control of volatile organic compound (VOC) emissions resulting from the storage of petrol and its distribution from terminals to service stations.
41. Council Directive 94/67/EEC on the incineration of hazardous waste
42. Council Directive 94/57/EC on common rules and standards for ship inspection and survey organizations and for the relevant activities of maritime administrations.
43. Council Directive 93/75/EEC concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods.
44. Communication from the Commission to the Council and the European Parliament on integrated coastal zone management: a strategy for Europe.
45. Council Regulation (EEC) No. 259/93 on the supervision and control of shipments of waste within, into and out of the European Community.
46. Council Directive 91/689/EEC on hazardous waste.
47. Council Directive 91/689/EEC on waste (Waste Framework Directive), amending Directive 75/442.
48. Council Directive 84/631/EEC on the supervision and control within the European Community of the transfrontier shipment of hazardous waste.
49. Council Decision 81/971/EEC setting out a Community information system on marine pollution caused by hydrocarbons.
50. Council Directive 76/464/EEC on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community, as amended.
51. Council Directive 75/439/EEC on the disposal of waste oils
52. Council Directive 75/442/EEC on waste

Annex 3

National legislation in the states in the Baltic Sea region cross-referring to the IMO conventions on ship-source marine pollution

Dumping Convention

Denmark

- Act No. 564 of 2005 to amend Act on the Protection of the Marine Environment, the Act relative to watercourses, the Act relative to summer holiday dwellings and campings and various other Acts.
- Act on the Protection of the Marine Environment.

Finland

- Act to amend the Sea Protection Act (No. 92 of 2000).
- Act to amend the Sea Protection Act (No. 221 of 1995).
- Sea Protection Act (No. 1415 of 1994).
- Act to amend the Water Act (No. 1416 of 1994).
- Decree on the prevention of marine pollution (No. 185 of 1981).
- Act on the prevention of pollution from ships (No. 300 of 1979).

Germany

- High Sea Prohibition Act.

Latvia

- Maritime Administration and Marine Safety Law.
- Regulation No. 34 regarding emissions of pollutants into the aquatic environment.

Poland

- Regulation on mode of issuing permissions for removing borings from bottom deepening into sea and for sinking wastes and other substances.

Sweden

- Act on Sweden's Exclusive Economic Zone of 1992.

MARPOL

Estonia

- Regulation No.60 of the Minister of transport and Communications regarding procedure for reception of bilge water, sewage and other pollutants from ships.

Finland

- Act on the prevention of pollution from ships (No. 300 of 1979).
- Decree No. 925 of 1998 on marine equipment.

Germany

- Act amending the Federal Maritime Jurisdiction Act.
- Internal Waters - Entering Requirements Ordinance.
- Hazardous Goods Ordinance - Sea.
- Ship Safety Ordinance.
- Ship Safety Act.
- Lower Saxony Waste Disposal Law.
- Used Oil Disposal Ordinance.
- Ordinance on discharge of ship-generated waste and cargo residues from ships in marine ports.

Latvia

- Maritime Code
- Regulation No. 42 of Riga Harbour.
- Maritime Administration and Marine Safety Law.

Poland

- Act on prevention of marine pollution by vessels.
- Regulation on scope and deadlines of service and inspection and laying down forms of international certificates concerning protection of sea from pollution by vessels. - 15 March 2006
- Regulation on mode of issuing permissions for removing borings from bottom deepening into sea and for sinking wastes and other substances. - 26 January 2006
- Regulation on information to be reported by loaders providing hazardous or polluting cargoes to be loaded into a vessel. - 30 April 2004
- Regulation on passing on, by shipowner, information about hazardous or polluting cargoes. - 12 May 2003
- Regulation on passing on information about wastes on a vessel. - 12 May 2003

- Regulation on organization and methods of prevention of hazards and pollution at sea. - 03 December 2002
- Regulation on organization and methods of preventing pollution on sea. - 13 May 1997
- Regulation establishing technical provisions on protecting sea pollution by vessels and inspection methods.
- Act on dock equipment for receiving of wastes and load remains from vessels.

Russian Federation

- Ministerial Decree No. 251 regarding validation of the list of hazardous substances the discharge of which from vessels, other floating objects, flying objects, artificial islands, plants and constructions in the exclusive economic zone of the Russian Federation is prohibited.
- Instruction of the Ministry of Environmental Protection and Natural Resources regarding the modalities of reporting marine pollution (1994).

OPRC

Latvia

- Maritime Administration and Marine Safety Law

Salvage Convention

Latvia

- Maritime Code

Lithuania

- Law on safe navigation
- Maritime Shipping Law (No. I-1513)

Poland

- Law on Territorial Waters and Administration.

CLC

Finland

- Act on the Liability for Oil Pollution from Ships (No. 401 of 1980).

Estonia

- Environmental Liability Act

Germany

- Environment Damage Act

Latvia

- Maritime Code

Lithuania

- Maritime Shipping Law (No. I-1513)

Russian Federation

- Federal Law No.27-FZ of 2000 regarding joining by the Russian Federation Protocol to the International Convention on Civil Liability for Oil Pollution Damage of 1992 and denouncement by the Russian Federation of the International Convention on Civil Liability for Oil Pollution Damage of 1969.

FUND

Estonia

- Environmental Liability Act

Finland

- Act to amend the Maritime Traffic Act (No. 421 of 1995)
- Act on the Liability for Oil Pollution from Ships (No. 401 of 1980)
- Act on the prevention of pollution from ships (No. 300 of 1979)

Germany

- Environment Damage Act

Latvia

- Maritime Administration and Marine Safety Law

Russian Federation

- Federal Law No. 187-FZ of 1995 on the continental shelf of the Russian Federation

Helsinki Convention

Estonia

- National Environmental Strategy (1997)

Finland

- Decree No. 302 of 2001 of the Council of State on the conformity assessment of packagings and tanks used for the transport of dangerous goods

- Act No. 755 of 2000 on territorial surveillance
- Decree No. 1123 of 1999 on Ship Surveys
- Act on the Liability for Oil Pollution from Ships (No. 401 of 1980)
- Decree No. 925 of 1998 on marine equipment
- Act on transport of dangerous substances

Latvia

- Maritime Administration and Marine Safety Law

Poland

- Regulation on mode of issuing permissions for removing borings from bottom deepening into sea and for sinking wastes and other substances.